

ORIGINAL  
FILE

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of:

MOTOROLA SATELLITE  
COMMUNICATIONS, INC.

Request for Pioneer's Preferences  
with Regard to Proposals to  
Establish Satellite Systems  
in the 1610-1626.5 MHz and  
2483.5-2500 MHz Bands.

ET Docket No. 92-28

PP-32

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MAY - 1 1992

To: Office of Managing Director  
Office of Engineering and Technology

Federal Communications Commission  
Office of the Secretary

**CONSOLIDATED REPLY TO**  
**OPPOSITIONS TO REQUEST FOR CONFIDENTIAL TREATMENT**

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### SUMMARY

Motorola Satellite Communications, Inc. hereby replies to the pleadings filed by several of the RDSS applicants opposing its request for confidential treatment of highly confidential and company proprietary information submitted in support of its pioneer's preference request. There should be no serious question that the information contained in Motorola's Confidential Appendix is subject to protection under the Commission's confidentiality rules.

The Commission also can consider this material in making its preliminary determination as to whether to grant Motorola a pioneer's preference for the technological and service innovations associated with the IRIDIUM™ system. If in awarding Motorola a tentative preference, the Commission relies upon any of the information contained in the Confidential Appendix, Motorola then should be given an opportunity to approve of the release of that information to its competitors before the Commission issues its final decision in this proceeding. Such an approach would be fully consistent with the policies underlying the Commission's pioneer's preference and confidentiality rules, as well as afford interested parties an opportunity to comment on any relevant confidential materials.

In this manner the Commission can reconcile the underlying objectives of its confidentiality and ex parte rules, while achieving the purposes of its pioneer's preference rules -- to encourage submission of new proposals, to decrease regulatory

uncertainty for the innovator, and to encourage investors to provide financial support.

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**CONSOLIDATED REPLY TO**  
**OPPOSITIONS TO REQUEST FOR CONFIDENTIAL TREATMENT**

Motorola Satellite Communications, Inc. ("Motorola") hereby files this consolidated reply to the Oppositions to Motorola's letter request for confidential treatment of a Confidential Appendix included with the materials submitted in support of its pioneer's preference request in this proceeding.<sup>1/</sup> The materials contained in that Confidential Appendix clearly contain trade secrets and company proprietary information entitled to protection under the Commission's confidentiality rules.

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<sup>1/</sup> Constellation Communications, Inc. Opposition to Request for Confidential Treatment (April 23, 1992) ("Constellation Opposition"), Ellipsat Corporation Opposition to Request for Confidential Treatment (April 21, 1992) ("Ellipsat Opposition"), Loral Qualcomm Satellite Services, Inc. Opposition to Request for Confidential Treatment (April 23, 1992) ("Loral Opposition"), and TRW, Inc. Opposition to Request for Confidential Treatment of Ex Parte Presentations (April 23, 1992) ("TRW Opposition").

Moreover, the Commission can consider this material in making its preliminary determination as to whether to grant Motorola a pioneer's preference for the technological and service innovations associated with the IRIDIUM™ system. If in awarding Motorola a tentative preference, the Commission relies upon any of the information contained in the Confidential Appendix, Motorola then should be given an opportunity to approve of the release of that information to its competitors for public comment before the Commission issues its final decision in this proceeding. Such an approach would be fully consistent with the policies underlying the Commission's pioneer's preference and confidentiality rules, as well as afford interested parties a fair hearing on Motorola's preference request.

I. OVERVIEW

Motorola filed its application to construct, launch and operate the IRIDIUM™ system on December 3, 1990.<sup>2/</sup> In conjunction with its application, Motorola also submitted a request for a pioneer's preference. Following the adoption of the Commission's pioneer's preference rules, Motorola's request for a pioneer's preference was renewed by a separate filing on

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<sup>2/</sup> See Application of Motorola Satellite Communications, Inc. for IRIDIUM™ -- A Low Earth Orbit Mobile Satellite System, File Nos. 9-DSS-P-91(87) & CSS-91-010 (Dec. 3, 1990). Additional supporting information was filed in a supplement in February 1991. See Supplemental Information to IRIDIUM™ System Application, File Nos. 9-DSS-P-91(87) & CSS-91-010 (February 22, 1991).

July 30, 1991.<sup>3/</sup> On April 10, 1992, pursuant to a Public Notice from the Chief Engineer establishing that date for filing pioneer's preference requests to be considered in this proceeding,<sup>4/</sup> Motorola submitted further supplemental materials in support of its request.<sup>5/</sup>

Motorola's opponents in this proceeding assert that the trade secrets and other proprietary information contained in the Confidential Appendix are not entitled to protection under the Commission's rules, and that even if they were to be deemed confidential, the Commission should not rely upon such information in considering Motorola's pioneer's preference request. Several of these parties further argue that the Confidential Appendix submitted by Motorola with a request for

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<sup>3/</sup> See Request for Pioneer's Preference, Motorola Satellite Communications Inc. (July 30, 1991). In that filing, Motorola incorporated by reference those portions of its pending application which bore upon its pioneer's preference request. Id. at 1 n.2.

<sup>4/</sup> See Public Notice, Mimeo No. 22205 (March 11, 1992).

<sup>5/</sup> See Supplement to Request for Pioneer's Preference (April 10, 1992). The Supplement included a 15-page brief and two appendices. One of the appendices contained confidential proprietary information and was submitted in a sealed envelope to the Commission only with a request for confidential treatment. The brief and the other appendix as well as a copy of the letter request for confidential treatment describing the contents of the sealed appendix were properly sent to all counsel of record, as well as to the Commission. To the extent that Ellipsat and Constellation complain of late receipt of the Supplement, their complaint lies with the U.S. Post Office. When counsel for Ellipsat informed counsel for Motorola that she had not received a copy of Motorola's filings relating to this matter, another copy was hand delivered more than a week before the April 23, 1992 reply date. Constellation's receipt on April 15, 1992 also gave it more than a week to reply.

confidential treatment is, in effect, an ex parte communication and either should be made public or returned to Motorola.

Motorola's Confidential Appendix clearly is entitled to confidential treatment under the Commission's rules and existing precedent. There can be no serious question that the patent materials, experimental test results, and computer simulations relating to the IRIDIUM™ system design are the proprietary work product of Motorola, and that the premature disclosure of this material to Motorola's competitors, including those parties filing oppositions in this proceeding, could have an adverse impact upon the relative position of Motorola in the marketplace.

In addition, the Commission must recognize the potential conflict between the public interest in a fair and open decision-making process,<sup>6/</sup> and the equally important interests in maintaining the confidentiality of the trade secrets and other proprietary information of those parties regulated by the Commission.<sup>7/</sup> Motorola's opponents, citing the ex parte rules, suggest that consideration of any confidential or non-public information submitted to the Commission would be fundamentally unfair, because it would deny the possibility of open debate on information which may become the basis for a decision by the Commission. Innovators of state-of-the-art technologies and radio services, such as Motorola, however, have legitimate concerns for protecting their investment in trade secret and

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<sup>6/</sup> See 47 C.F.R. § 1.1200-1.216 (1991).

<sup>7/</sup> See 47 C.F.R. § 0.457(d) and 47 C.F.R. § 0.459 (1991); 5 U.S.C.A. § 552(b)(4) (1991).

proprietary information which may be relevant to a request for pioneer's preference.

The Commission must accommodate both of these competing considerations. The Commission should be permitted to review confidential materials in any pioneer's preference proceeding to determine, in the first instance, whether an applicant deserves a tentative designation as a pioneer. To the extent that the Commission relies on any confidential information in making such a preliminary determination, the applicant seeking the preference should have to agree to make that information available to opponents for their review and comment before a final preference is awarded. If the applicant refuses to have this material placed in the public record, the tentative preference would be denied. Confidential information not relied upon by the Commission in making its preliminary decision would be returned. Such an approach would not discourage future innovators from applying for a pioneer's preference, and would protect the rights of all interested parties.

II. MOTOROLA'S CONFIDENTIAL APPENDIX IS ENTITLED  
TO PROTECTION UNDER THE COMMISSION'S RULES

Motorola's cover letter requesting confidential treatment identified the materials in its Confidential Appendix as company proprietary information concerning Motorola's IRIDIUM™ system, including descriptions of pending patent applications, preliminary results of experiments and field tests, a videotape of a voice simulation of the IRIDIUM™ system, and a computer

diskette containing copyrighted software which simulates operation of intersatellite links.<sup>8/</sup>

Section 0.457 of the Commission's Rules, 47 C.F.R. § 0.457, lists categories of records not routinely available for public inspection. Specifically included under Section 0.457(d) are "[t]rade secrets and commercial or financial information obtained from any person and privileged or confidential." The rule cites to the Freedom of Information Act, 5 U.S.C. 552(b)(4), and describes the Commission's broad authority to withhold from public inspection "materials which would be privileged as a matter of law if retained by the person who submitted them, and materials which would not customarily be released to the public by that person, whether or not such materials are protected from disclosure by privilege."<sup>9/</sup>

An extensive body of case law has honed the definition of the "trade secrets" exemption under the Freedom of Information Act. A "trade secret" exempt from disclosure under 5 U.S.C. § 552 (b)(4), is a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.<sup>10/</sup> This exemption serves to encourage cooperation with

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<sup>8/</sup> See Letter to Donna R. Searcy, April 10, 1992, Re: Request for Confidential Treatment, ET Docket No. 92-28; File No. PP-32.

<sup>9/</sup> See 47 C.F.R. § 0.457(d) (1991).

<sup>10/</sup> Anderson v. Department of Health and Human Services, 907 F.2d 936 (10th Cir. 1990); Public Citizen Health Research Group v. Food and Drug Admin., 704 F.2d 1280 (D.C. Cir. 1983);

(continued...)

the government by persons with information useful to officials and the equally important purpose of protecting persons who submit financial or commercial data to government agencies from competitive disadvantages.<sup>11/</sup>

Loral's assertion that the materials submitted in Motorola's Confidential Appendix do not warrant confidential treatment simply is incorrect. First, Loral cites to two cases, New York Telephone Co., 67 RR 2d 567, 567-68 (1990) and MTS & WATS Market Structure, 66 RR 2d 1668, 1670 (1989), where aggregated financial information and traffic volume data (already reportable to the Commission) were at issue, not proprietary technological information, plans, and patent applications that form part of an ambitious and innovative service. Second, the very cases cited by Loral recite standards entirely consistent with according Motorola's proprietary materials confidential treatment. "To justify withholding data under Exemption 4, it is not necessary to show actual competitive harm. Rather, the entity or person seeking confidentiality of the data must show that substantial competitive injury is likely to result from disclosure." New York Telephone, 67 RR 2d at 567-68 (emphasis supplied).<sup>12/</sup> Third, pending patent applications governed by

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<sup>10/</sup> (...continued)  
Burnside-Ott Aviation Training v. U.S., 617 F. Supp. 279 (D. Fla. 1985).

<sup>11/</sup> Audio Technical Services Ltd. v. Department of the Army, 487 F. Supp 779 (D.D.C. 1979).

<sup>12/</sup> The cases relied on by the Commission in the decisions cited by Loral, are equally clear, see, e.g. National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1987) (in  
(continued...)

the Patent Act, 35 U.S.C.A. § 122, constitute materials specifically exempted from disclosure by statute under the Freedom of Information Act.<sup>13/</sup>

It is clear that the materials contained in Motorola's Confidential Appendix and described in Motorola's request for confidential treatment fall squarely within the trade secrets exception, both as it is elaborated in the Commission's own rules and in the case law interpreting the Freedom of Information Act.<sup>14/</sup>

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<sup>12/</sup> (...continued)  
determining whether disclosure of financial documents would cause substantial competitive harm the court need only exercise its judgment in view of nature of material sought and competitive circumstances in which the defendants do business).

<sup>13/</sup> Irons & Sears v. Van Dann, 606 F.2d 1215 (D.C. Cir), cert. denied, 444 U.S. 1075, 100 S.Ct. 1021 (1979).

<sup>14/</sup> In its request, Motorola stated that the materials contained in the confidential appendix were being submitted voluntarily. Motorola noted that pursuant to Section 0.459(e) of the Commission's Rules, if the Commission denies a request for confidential treatment, the materials at issue will be returned without placing them in the public record. If for any reason the Commission determines that the confidentiality of the voluntarily produced materials cannot be maintained, the materials should be returned to Motorola and not provided to Motorola's competitors. Release of the extensive technical information included in the Confidential Appendix could cause substantial competitive harm to Motorola. See Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir), cert. denied, 431 U.S. 924, 97 S.Ct. 2199 (1976).

III. THE COMMISSION MUST ADDRESS THE COMPETING INTERESTS ASSOCIATED WITH ITS RULES RELATING TO CONFIDENTIAL TREATMENT OF TRADE SECRETS AND TO EX PARTE COMMUNICATIONS

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The opposing parties assert that in a contested proceeding such as this one, it would be improper to allow information from Motorola's confidential materials to form the basis of a pioneer's preference decision without the opportunity of interested parties to comment on those materials.<sup>15/</sup> They further argue that Motorola's Confidential Appendix violates the letter and spirit of the Commission's ex parte rules,<sup>16/</sup> which are designed to "ensure that the Commission's decisional processes are fair, impartial and otherwise comport with the concept of due process." 47 C.F.R. § 1.1200(a).

These opponents ignore, however, the fact that Motorola provided this information to the Commission in accordance with the confidentiality rules, and that each party to this proceeding was provided with notice of the filing of this confidential material. The issue squarely presented in this proceeding is the extent to which the Commission can or should rely upon confidential information in determining whether to award an applicant a pioneer's preference. Motorola recognizes that there may be an inherent conflict between the interests protected by the Commission's ex parte and confidentiality rules. In this proceeding, the Commission is confronted with equally important

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<sup>15/</sup> See e.g. Ellipsat Opposition at 2.

<sup>16/</sup> Id. at 3; Constellation Opposition at 2-3; TRW Opposition at 3.

concerns as to the protection of confidential and extremely sensitive trade secrets potentially relevant to a determination of whether to award a pioneer's preference, while at the same time guaranteeing the impartiality of Commission decisions and creating a legitimate record for public comment and possible judicial review.<sup>17/</sup>

Motorola has a significant investment of time, money, and intellectual property in just the kind of innovative technologies and radio services the pioneer's preference rules were designed to encourage. By seeking to protect the confidentiality of these valuable trade secrets and proprietary information, Motorola could be foreclosed from having the Commission consider potentially relevant information as a basis for its decision. Absent adequate protection of such confidential information, some innovators certainly might be discouraged from applying for a preference. As a result, the

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<sup>17/</sup> Contrary to the assertions of TRW, Motorola supports robust debate, fundamental notions of fairness, and the ideal of reasoned decision-making on the merits. Motorola notes that the "intolerable" ex parte contacts criticized in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829, rehearing denied, 434 U.S. 988 (1977), and cited by TRW, were numerous unrecorded personal meetings of parties with individual Commissioners and staff. In this proceeding, Motorola submitted its Supplement, one appendix of public information, and a copy of its request for confidential treatment describing the contents of the Confidential Appendix to all counsel of record. To suggest that Motorola's conduct can even be compared to the abuses described in Home Box Office is absurd. Motorola has, as many future innovators will have, a legitimate stake in protecting proprietary information which must be balanced against the competing demands of an open and transparent decision-making process. To the extent that the Commission can reconcile these interests in its procedures, the pioneer's preference rules are likely to achieve the Commission's goals. If these competing interests are not reconciled, the entire process may become a useless exercise.

public interest would not be served and the very purposes of the pioneer's preference rules -- to encourage submission of new proposals, to decrease regulatory uncertainty for the innovator, and to encourage investors to provide financial support -- will be thwarted.<sup>18/</sup>

Motorola suggests an approach for reconciling this conflict in the context of this proceeding. This approach builds upon the procedures already in place for consideration of pioneer's preference requests, i.e., providing for a preliminary or tentative determination that an applicant is entitled to a preference, to be followed by notice and comment before the award of a final preference.<sup>19/</sup> The Commission clearly has the discretion under Section 4(j) of the Communications Act of 1934, as amended,<sup>20/</sup> "to authorize public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of the public and private interests involved."<sup>21/</sup>

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<sup>18/</sup> See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, on reconsideration, 7 FCC Rcd. 1808, 1810 (1992) ("Pioneer's Preference Reconsideration Order").

<sup>19/</sup> See "Pioneer's Preference Reconsideration Order" supra and Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488, 3497 (1991) ("Pioneer's Preference Order").

<sup>20/</sup> See 47 U.S.C.A. § 154(j) (1991).

<sup>21/</sup> FCC v. Schreiber, 381 U.S. 279, 291-92, 85 S.Ct.1459, 1468 (1965); see also Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 53 S.Ct. 350 (1933).

Where an applicant desires confidential treatment of materials potentially relevant to its pioneer's preference request:

- ♦ First, the Commission should review applications without reference to the confidential information. In some instances (Motorola's application is a likely example), it may be possible to award a tentative preference without recourse to the confidential materials submitted.
- ♦ Second, where the Commission cannot reach a decision based on non-confidential information alone, it should review the confidential information submitted.
- ♦ Third, if the Commission decides against the request, the confidential material can be returned without being made public.
- ♦ Fourth, if the Commission, after reviewing the confidential information, decides to award a tentative preference, it would (1) determine the extent to which the confidential information formed the basis of the decision, and (2) require the applicant to release any decisionally significant material for public comment before making a final preference determination.
- ♦ Fifth, if the applicant refuses to make the required confidential information available, the tentative preference would be denied.
- ♦ Sixth, accept comments on its tentative preference award and then make a final determination on whether to grant the applicant a pioneer's preference.

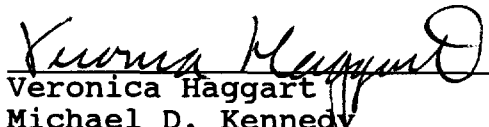
Motorola recommends that the Commission follow this approach in determining whether to grant it a pioneer's preference in this proceeding.


IV. CONCLUSION

For the foregoing reasons, the Commission should grant confidential treatment to Motorola's Confidential Appendix and follow the approach suggested herein for reviewing confidential information submitted in contested pioneer's preference proceedings.

Respectfully submitted,

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May 1, 1992

CERTIFICATE OF SERVICE

I, Philip L. Malet, hereby certify that the copies of the foregoing Consolidated Reply to Oppositions to Request for Confidential Treatment were served by first-class mail, postage prepaid, this 1st day of May, 1992, on the following persons:

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